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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 438

FULTON IRON COMPANY, A CORPORATION,
PETITIONER

v.

JESS LARSON, AS WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court for the District of Columbia dismissing the complaint was entered without an opinion (R. 55). The opinion of the Court of Appeals for the District of Columbia Circuit (R. 71) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1948 (R. 77). The petition for a writ of certiorari was filed on November 29, 1948. The jurisdiction of this Court presumably is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, an unsuccessful bidder under an invitation to submit bids for the purchase of certain surplus realty belonging to the United States, has standing to maintain the instant suit.

2. Whether the United States, which has not given its consent to be sued, is the real party in interest or an indispensable party which has not been impleaded.

STATUTE AND REGULATION INVOLVED

The applicable provisions of the Surplus Property Act of 1944, 58 Stat. 765, as amended, 50 U. S. C. App. 1611–1646, and the pertinent provisions of War Assets Administration Regulation 5 are set forth in the Appendix, *infra,* pp. 26–36.

STATEMENT

On September 13, 1947, the War Assets Administration issued an invitation for purchase proposals of certain surplus property designated by War Assets Administration as "Plancor 438" (R. 27–31). "Plancor 438" is an industrial plant, situated on a tract of land of more than 210 acres at Granite City, Illinois, which comprises two blast furnaces and a battery of by-product ovens producing coke and related products for use in the manufacture of pig iron (R. 32). These facilities are owned by the Government and were formerly operated under a lease by Koppers Company, Inc. They are now operated by Missouri-

Illinois Furnaces, Inc., under a contract of sale of October 29, 1947, with the War Assets Administration.

The invitation to bid fixed the minimum purchase price at $2,250,000, and set forth a great number of terms and conditions that the purchaser must meet (R. 28–31).

Prior to the invitation, in March 1947, Brassert & Company, engineering specialists, which had made a detailed study of the facilities comprising "Plancor 438" at the request of the War Assets Administration, submitted a report estimating the fair value of the property at $2,520,000 (R. 33). The Report of the Engineers of the War Assets Administration on March 28, 1947, estimated the fair value of the property at $3,250,000 (R. 33). On September 6, 1947, the Appraisal Division of W. A. A. in a memorandum to the Real Property Board summarized the estimates previously submitted and concluded that "the minimum Fair Value of the plancor should not be less than $2,500,000" (R. 33–34). As pointed out above, the invitation for purchase proposals without reference to fair value or intrinsic worth fixed the minimum purchase price at $2,250,000.

On October 6, 1947, following the invitation for proposals of September 13, 1947, three purchase proposals were received as follows:

Missouri-Illinois Furnaces, Inc.	$3,255,000
Tucker Corporation	2,751,000
Fulton Iron Company	2,750,000

On October 10, 1947, in an intra-agency memorandum by the Appraisal Division to the Real Property Review Board, the prior fair value estimates were set forth without comment (R. 35). On October 29, 1947, the purchase proposal of the Missouri-Illinois Furnaces, Inc., was accepted by the War Assets Administration in a letter of intent (R. 41–47) subject to the conditions set forth therein. This letter of intent, with the conditions therein imposed, was, in turn, accepted by Missouri-Illinois Furnaces, Inc., on the same day (R. 47).

Under the terms of this agreement, the purchaser agreed to pay to the seller a total consideration of $3,255,000, of which 20 percent was to be paid as a minimum down payment and the remainder of the purchase price paid by installments with interest over a maximum period of ten years commencing three months after closing. The contract also provided that the taxes be prorated; that agreements be executed between the lessee and the purchaser with respect to the release of certain obligations which War Assets Administration had with the lessee; that an agreement be executed by Koppers Company, Inc. (the lessee) and Hanna Coal and Ore Corporation, the owners of the capital stock of Missouri-Illinois Furnaces, Inc., guaranteeing the unpaid balance of the purchase money (R. 43–44).[1] The contract further provided

[1] The appropriate executed agreements of Koppers Company, Inc., and Hanna Coal and Ore Corporation were attached (R. 48, 49).

that "upon acceptance of this letter of intent and payment of six hundred fifty-one thousand dollars ($651,000) representing the down payment, Seller shall transfer possession of the facilities to Purchaser effective as of midnight October 31, 1947, which shall be the effective date of sale. From and after effective date of sale, Purchaser will be responsible for the property sold and assume all losses and will hold the Seller harmless from any and all liabilities arising out of the use and occupancy of said premises" (R. 44).

The provision contained in the proposal of Missouri-Illinois Furnaces, Inc., that the title was to be transferred by December 31, 1947, or the purchase price refunded and all rights and obligations under its proposal null and void, was superseded by the letter of intent of the WAA of October 29, 1947, which provided that "complete title to the plancor property is to be conveyed by quitclaim deed, and, if necessary, in addition thereto a bill of sale, on a date to be mutually agreed upon, not later than sixty (60) days after clearance by the Department of Justice, unless such time limitation is extended by mutual consent" (R. 42).

Under the terms of the agreement as set forth in the letter of intent, the purchaser agreed among other conditions not to sell or lease the same within a period of two years from the date of the completed transaction without first obtain-

ing the written authorization of the seller to such sale or lease (R. 46). The agreement was made subject to the following conditions: (1) compliance with the requirements of War Assets Administration Regulation 5, including amendments thereto; (2) advice by the Department of Justice that the proposed sale is not violative of the antitrust laws of the United States; (3) any other legal requirements deemed necessary by the Real Property Division, Office of the General Counsel (R. 46–47). The agreement also contained other terms and conditions not here relevant. In closing, the agreement provided (R. 47):

> The sale of the entire facilities of plancor 438 is approved on the terms above stipulated only, which terms and conditions exclusively govern the entire commitment of War Assets Administrator.

The proposed sale was then submitted to the Department of Justice for an opinion as to its effect on the antitrust laws as provided in Section 20 of the Surplus Property Act of 1944 (50 U. S. C. App. 1629). Missouri-Illinois Furnaces, Inc. was an Illinois corporation whose capital stock was owned in equal shares by Koppers Company, Inc. and Hanna Coal and Ore Corporation. Because of the informal objection by the Department of Justice that this combination would violate the antitrust laws (R. 36–37), the company, on January 14, 1948, wrote to the

War Assets Administration stating that Koppers Company, Inc. had agreed to purchase all of the stock of Missouri-Illinois Furnaces, Inc. owned by Hanna Coal and Ore Corporation, effective as of the close of business on January 31, 1948. It further stated that Koppers Company, Inc. would assume the obligations of the Hanna Coal and Ore Corporation and guarantee the full amount of the mortgage debt of Missouri-Illinois Furnaces, Inc. (R. 23, 24). In reply, the War Assets Administration advised that the proposed modification of stock ownership was unobjectionable to the Administration (R. 25).

On the basis of this exchange of letters and after reviewing the memoranda submitted with respect to the proposed sale, on January 15, 1948, the last day of the ninety-day period allowed in Section 20 for an opinion, the Acting Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, in a letter to the War Assets Administration, stated that consummation of the proposed sale to Missouri-Illinois Furnaces, Inc., as a wholly owned subsidiary of Koppers Company, Inc., would not be regarded as a violation of the antitrust laws (R. 26–27).

Before the completion of the transfer of the title papers under the agreement of October 29, 1947, the Fulton Iron Company, on February 2, 1948 (R. 57), filed its complaint in the District Court to enjoin the War Assets Administrator from completing the transfer (R. 1–11). The

District Court denied successively petitioner's motion for a temporary restraining order, a temporary injunction, and a motion for an injunction pending appeal; and granted respondent's motion to dismiss the complaint on March 11, 1948 (R. 50–54). The Court of Appeals granted petitioner's motion for an injunction pending appeal on May 7, 1948 (R. 77). It affirmed the decision of the District Court on October 13, 1948 (R. 77), in an opinion holding that petitioner, having only the status of a disappointed bidder, lacked capacity to sue, and that the United States, which had not consented to be sued, was an indispensable party.

Thereafter, petitioner filed its motion in the Court of Appeals to stay the mandate and to continue the temporary injunction pending application for a writ of certiorari. Respondent opposed with the request that sufficient bond be required of petitioner. The court below, on November 2, 1948, ordered that the mandate be stayed, continuing the temporary injunction theretofore entered in full force and effect without bond (R. 83). Respondent then filed a motion (R. 84) for a withdrawal or modification of certain portions of the court's opinion of October 13, 1948 (R. 71),[2]

[2] The purpose of this motion, which is set forth in full in the record (R. 84–87), was to seek to persuade the court below to delete from its opinion certain statements and observations which respondent deems to be objectionable and which are without support in the record. The statements without sup-

which petition the court denied on November 10, 1948 (R. 94).

ARGUMENT

Petitioner seeks review of the decision below, not only on the ground that it was incorrect, but also on the ground that the basic question involving the discretion of the Administrator in disposing of surplus property is a matter of national concern (Pet. pp. 11–12). We submit, however, that, although the question of judicial restraint of the property disposal policies of the Govern-

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port in the record are those to the effect that respondent "arbitrarily raised the fair value [of Plancor 438] from $2,500,000 to $3,250,000" (R. 72; see also R. 74). So far as the record shows, no change in the fair value of $2,500,000 fixed on September 6, 1947 (R. 32–34) has been made. The memorandum of October 10, 1947 (R. 34–35) merely recites again the two valuations discussed in the memorandum of September 6, without in any way recommending any change or the adoption of either. Both of these memoranda, submitted by petitioner as exhibits to its complaint, override the allegations of Paragraph 7 of the complaint (R. 2), that such an increase had been made. Moreover, any such increase was unnecessary for the bid of Missouri-Illinois was the highest bid and exceeded not only the fair value of $2,500,000 but also the figure of $3,250,000, and for reasons set forth, *infra*, pp. 15–20, that bid was valid. Finally, characterization of responsible officials' action as "skulduggery" (R. 73) should not be made on the type of record here presented, comprised exclusively of allegations which are contradicted by petitioner's own exhibits, particularly where the officials in question sought only to sell the surplus property to the firm which was not only the highest bidder and was of proven financial responsibility, but which undertook to utilize the property in what the officials considered to be the best interest of the national economy.

ment is a question of general importance, it is not a novel one. The decision below is correct, and accords with the long settled rulings of this Court that judicial interference with executive discretion would "be productive of nothing but mischief." *Decatur* v. *Paulding*, 14 Pet. 497, 516; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127–128. No reason for further review therefore exists.

Petitioner's case is that it has a contract with the respondent for the sale to petitioner of Plancor 438, and that it is entitled in effect to specific performance of that contract. We submit that the facts clearly show that respondent not only did not contract to sell Plancor 438 to petitioner, but also that respondent entered into such a contract with another and higher bidder for the property. Absent such a contract, petitioner lacks standing to sue. Further, even if there was a contract of sale between petitioner and respondent, the United States is the real party in interest and an indispensable party. Since the United States has not consented to be sued, the petitioner's suit cannot be maintained.

1. It is fundamental that petitioner must demonstrate its standing to sue before it can contest the validity of the action taken by respondent. Petitioner must show that such conduct invades a private substantive, legally protected interest, an interested recognized at common law or created by statute, or the suit must fail for want of a jus-

ticiable controversy. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *Associated Industries* v. *Ickes*, 134 F. 2d 694, 700–701 (C. A. 2). It is conceded by petitioner herein that "The petitioner's capacity to sue depends upon the question whether petitioner had entered into a contract with respondent" (Pet. p. 14).

By means of what the court below characterized as an ingenious but entirely unsound argument, petitioner has endeavored to establish the existence of a contract between it and respondent. Distorting the meaning of the invitation for purchase proposals for this industrial plant which was issued by respondent, petitioner contends that the disposal procedure in this case was not merely analogous to an auction but was, in fact, an auction without reserve covered by Section 21 of the District of Columbia Uniform Sales Act (Pet. p. 16).[3] Thus, it is asserted by petitioner that respondent made an offer to sell and that the bid of petitioner was an acceptance creating contractual rights conditioned upon no more acceptable bid being received (Pet. p. 19). It then contends that its bid was the only qualified acceptance of the offer to sell, the bid of Missouri-Illinois

[3] Aside from the fact that the Uniform Sales Act does not apply to a sale of real property, this question is one of federal, rather than local, law. *Caldarola* v. *Eckert*, 332 U. S. 155, 158; *United States* v. *Allegheny County*, 322 U. S. 174, 185; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366–367; *Girard Trust Co.* v. *United States*, 149 F. 2d 872, 874 (C. A. 3).

Furnaces, Inc. having failed allegedly because it contained an express condition, which was not met, of a time limit for the passage of title (Pet. pp. 19–20); because it violated the antitrust laws (Pet. pp. 20–22); because the requisite statutory approval of the Attorney General had not been obtained (Pet. pp. 22–24); and because the change in stock ownership of Missouri-Illinois Furnaces, Inc. transforms that entity into a stranger to the bid (Pet. p. 25).

a. Even if it were assumed *arguendo* that the bid of Missouri-Illinois Furnaces, Inc. failed, petitioner's position is nevertheless untenable. It is well-settled commercial law that a contract to sell, or a sale, is not concluded until the bids which result from the invitation to bid extended by a government official or a private owner have been inspected and the best bid accepted. Until acceptance of his bid, the bidder acquires no title to or interest of any nature in the property. *Blossom* v. *Railroad Co.*, 3 Wall. 196; see also *Semmes* v. *United States*, 91 U. S. 21, 26; *Camden* v. *Mayhew*, 129 U. S. 73, 82; *In re Realty Foundation*, 75 F. 2d 286 (C. A. 2d).

By the terms of the letter of September 13, 1947, petitioner and others were "invited to submit a proposal in accordance with the terms and conditions and information requested in the enclosed Formula." (R. 28.) The invitation stated that "War Assets Administration will make sale of this property to the bidder whose purchase

proposal (a) meets and/or betters the terms and conditions of this Formula * * * on a competitive basis and (b) best meets the objectives of the Surplus Property Act" (R. 27). The Formula set forth in considerable detail the various terms and conditions required of prospective bidders and provided that the bidder might propose additional consistent terms and conditions (R. 29–31).

Clearly this invitation to bid did not transform the Administrator into an auctioneer, hammer in hand, who was without power to refuse to sell to petitioner. The discretion necessarily vested in the Administrator to dispose of surplus property so as to effectuate the objective of the Act[4] precludes any such conception. The very admission of petitioner that "the amount of the bid is subordinate to the other objectives of the Act" (Pet. 16)[5] contradicts its assertion that this was an auction without reserve. It should also be noted that the complaint itself is likewise at variance with petitioner's theory of an auction without reserve. Paragraph 22 complains that respondent failed to notify unsuccessful bidders, including petitioner, that they might *renew* their offers (R. 9), and the prayer for relief (R. 10) requests

[4] The objectives are set forth in Section 2 of the Act (50 U. S. C. App. 1611).

[5] The court below found "There was wide discretion vested by the Act in the Administrator in disposing of the surplus property and there were other objectives than price which must lawfully and properly be taken into consideration" (R. 75).

that respondent be ordered to *negotiate* for the sale of the property on the basis of a new bid made by petitioner on January 12, 1948 (R. 6)—neither of which would be either relevant or material if a contract to sell had been made.

On October 6, 1947, three proposals had been submitted in accord with the terms of the invitation. Petitioner's offer was lowest; that of Missouri-Illinois Furnaces, Inc., was highest. WAA accepted the bid of Missouri-Illinois; it did not and has not accepted the bid of petitioner. It follows that petitioner has not established any infringement of a contractual right. The principle is basic that the submission of an offer for a contract with a public agency creates no rights in the offeror, regardless of the statutory restrictions limiting the manner in which the contract may be let.[6] *Colorado Paving Co.* v. *Murphy,*

[6] As the court below observed in treating another aspect of this case (R. 76) "The case which to us seems absolutely controlling on this point is the celebrated case of *United States ex rel. Goldberg* v. *Daniels*," 231 U. S. 218. In that case, the Navy advertised for proposals of purchase of a cruiser. Goldberg was the highest bidder, bidding more than the appraised amount and tendering payment of the whole sum. Secretary Daniels, having in the meantime decided to accede to the request of the State of Oregon to lend the old cruiser to that State as a training vessel, refused to deliver the vessel and returned the check to Goldberg. Goldberg petitioned for mandamus to compel delivery of the cruiser; Daniels in his answer admitted the facts as stated but set up the defense that the bid was not an acceptance of an offer but was itself only an offer, subject to be accepted or not at the discretion of the Secretary of the Navy. The Court of Appeals for the

78 Fed. 28 (C. A. 8), appeal dismissed, 166 U. S. 719; *Champion Coated Paper Co.* v. *Joint Committee on Printing of Congress,* 47 App. D. C. 141; *B. F. Cummins Co.* v. *Burleson,* 40 App. D. C. 500; *Martin* v. *United States,* 61 C. Cls. 430; *Strong* v. *United States,* 6 C. Cls. 135.

b. Even if we were to accept the strained conception of petitioner that the procedure herein involved was an auction without reserve, petitioner still lacks standing to sue because the bid of Missouri-Illinois Furnaces, Inc., has not failed.

(1) A reading of the invitation establishes that WAA was soliciting proposals to purchase the property, not in strict compliance with rigid specifications permitting of no alteration, but within the limits framed by the Formula, and the proposals were submitted on that basis. As pointed out by petitioner, Paragraph 7 of the Missouri-Illinois Furnaces, Inc., proposal stated, "Title to the property * * * shall be delivered to us at a time to be mutually agreed upon, but not later than December 31, 1947" (R. 15). And Paragraph 11 provided, "If such purchase is not completed by transfer of title to us prior to December 31, 1947, * * * all other rights and obligations hereunder shall be null and void" (R.

District of Columbia, upon Goldberg's demurrer to the answer, dismissed the petition on the ground that the discretion of the Secretary was not ended by the receipt and opening of the bids even though they satisfied all the conditions prescribed.

16). Since title was not delivered prior to December 31, 1947, petitioner contends the bid of Missouri-Illinois Furnaces, Inc., became null and void and therefore failed (Pet. pp. 19–20).

Even aside from the fact that these provisions were inserted in the purchase proposal by Missouri-Illinois for its protection and, therefore, were waivable by it, petitioner has misinterpreted the effect of the transactions between the Government and Missouri-Illinois. On October 29, 1947, that condition disappeared with the acceptance by Missouri-Illinois of the letter of intent and the conditions therein imposed by WAA (R. 41–47). The resulting contract of sale set forth in detail all of the terms and conditions as to the sale of this property, "which terms and conditions exclusively govern the entire commitment of War Assets Administrator" (R. 47). Paragraph 8 of the contract provides, in part:

> * * * From and after effective date of sale, Purchaser will be responsible for the property sold and assume all losses and will hold the Seller harmless from any and all liabilities arising out of the use and occupancy of said premises. *Subject only to final completion of transfer of title by Seller to Purchaser, as herein provided, Purchaser shall be in all respects deemed the owner of the facilities,* and shall be responsible for all insurance coverage, taxes, and assessments, including pro rata of 1947 taxes for the period from the effective

> date of sale to December 31, 1947; maintenance costs and other expenses accruing in connection with such facilities or the operation thereof. From and after said date, Seller shall have no further financial responsibility in regard to such facilities of any nature whatsoever. [Italics supplied.]

Thus, a complete contract of sale of the property between the United States and Missouri-Illinois Furnaces, Inc., was entered into and consummated before the expiration of the December 31, 1947, deadline for transferring title contained in the proposal. The time for conveying title, by the express terms of the contract, was to be "not later than sixty (60) days after clearance by the Department of Justice, unless such time limitation is extended by mutual consent" (R. 42). To talk about December 31, 1947, is to ignore the binding commitment entered into on October 29, 1947. Whether conditional or unconditional, such letters "would be classed as contracts and enforceable." See *Garfielde* v. *United States,* 93 U. S. 242; *American Smelting Co.* v. *United States,* 259 U. S. 75; *United States* v. *Purcell Envelope Co.,* 249 U. S. 313. Williston, *Contracts* (Revised Edition, 1945, Vol. 9, War Contract Claims), Section 198 and footnote 5.

(2) The proposed sale was then submitted to the Department of Justice for an opinion as to its effect on the antitrust laws, as provided in Section 20 of the Surplus Property Act (50

U. S. C. App. 1629). Missouri-Illinois' capital stock was owned in equal shares by Koppers Company, Inc., and Hanna Coal and Ore Corporation. Because of this joint ownership, the Department informally reached the conclusion that the combination of the two companies would, particularly because of the affiliations of the Hanna Coal and Ore Corporation, result in violations of the antitrust laws, but made no ruling thereon (R. 36–37). Despite the absence of any official action by the Department of Justice affirming this informal conclusion, petitioner urges that the Administrator should have immediately disqualified the bid of Missouri-Illinois Furnaces, Inc. (Pet. p. 22). This contention of petitioner ignores the fact that the informal conclusion was followed by a formal ruling complying in full with Section 20. On January 14, 1948, Missouri-Illinois wrote to WAA stating that Koppers had agreed to purchase all the stock of Missouri-Illinois owned by Hanna Coal and Ore Corporation, effective as of the close of business on January 31, 1948 (R. 23–24). Upon the basis of this information, the Acting Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, in a letter of January 15, 1948, the last day of the ninety-day period allowed in Section 20 for an opinion thereon, stated that "we would not regard consummation of the proposed sale to the Missouri-Illinois Furnaces, Inc., as a wholly owned

subsidiary of the Koppers Company, Inc., to be a violation of the antitrust laws" (R. 26–27).

(3) Relying upon the fact that the letter was signed by an Acting Assistant Attorney General and that the Attorney General did not endorse his approval thereon, petitioner contends that the opinion did not meet the requirements of Title 5 U. S. C. 308 and was, therefore, "the mere color of compliance with Section 20 of the Surplus Property Act" (Pet. pp. 23–24). However, this contention is without merit since Section 8 of the Surplus Property Act (50 U. S. C. App. 1617) specifically authorizes the head of any government agency to delegate and redelegate to any employee of such agency the duties imposed by that Act. The Attorney General's duties under Section 20 of the Surplus Property Act have been delegated to the Decree and Surplus Property Section of the Antitrust Division, 11 F. R. 177a–103 (§ 51.21 (g)).

(4) Petitioner's final reason for urging that the bid of Missouri-Illinois failed—the sale of 50 percent of its stock by Hanna Coal & Ore Corporation to Koppers Company on January 31, 1948—is frivolous. Aside from the fact that Missouri-Illinois, a corporation, has continuously remained the same legal entity, it is apparent that the change in stock ownership did not occur until after the formation of a binding and definitive contract on October 29, 1947. Moreover, even as-

suming a change of corporate identity, Paragraph 12 of the contract (R. 46) specifically contemplates and provides for the transfer of this property to persons other than Missouri-Illinois, with the approval of the Administrator. Further, Paragraph 16 of the contract (R. 46) specifically permits Missouri-Illinois, with the approval of the Administrator, to assign either the agreement or its rights thereunder. Since the Administrator was advised of the change in ownership on January 14, 1948 (R. 23–24) and approval was granted on the same day (R. 24–25), it cannot be seriously asserted that a change in the corporate identity of Missouri-Illinois, if it had occurred, would be relevant.

(5) Even assuming that the bid of Missouri-Illinois failed, there is no basis for the assertion of petitioner that "The bid of petitioner was the bid which best met the terms and conditions of respondent's offer to sell * * * and was the bid which accepted respondent's offer" (Pet. p. 25). Petitioner thereby ignores the very objection it is making as to the bid of Missouri-Illinois—no bid can "accept[ed] respondent's offer" until the Department of Justice has ruled that it would not be violative of the antitrust laws. Petitioner has not shown that its proposal would be cleared by the Department of Justice.

To summarize, in order for petitioner to show that it has standing to sue, it must prove that it has a contract with respondent (Pet. p. 14). We

submit that the bid of petitioner was not an acceptance of an offer made by the Administrator at an auction without reserve, but was itself an offer made in response to an invitation to bid issued by respondent. Since the Administrator not only has not accepted petitioner's offer but has entered into a valid contract with Missouri-Illinois, petitioner has no standing to sue.

2. Even assuming that petitioner has a valid contract for the sale to it of Plancor 438, it cannot bring suit against the United States. Although petitioner characterizes this action as one for an injunction against the alleged illegal and unauthorized action of respondent (Pet. p. 26), and the United States is not named as a party, the complaint on its face shows that, in all but the defendant's name,[7] the suit is, in effect, one to compel specific performance by the United States, which has not consented to be sued.[8] In its prayer for relief, petitioner requests the court to decree that "Defendant negotiate with plaintiff for the sale of said Plancor 438 by defendant

[7] In determining whether the suit is against the sovereign, it is, of course, immaterial that the sovereign is not named as a party defendant. *Ex parte New York*, 256 U. S. 490, 500; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371; *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459, 464.

[8] It may well be that Missouri-Illinois is an indispensable party to this action because of its contract of purchase for this plant. *Brady* v. *Work*, 263 U. S. 435. See also *Ducker* v. *Butler*, 104 F. 2d 236, 238, 239 (App. D. C.).

to plaintiff for the same price and terms of payment as set forth in said bid of Missouri-Illinois Furnaces, Inc." (R. 10). Although all cases in the field of sovereign immunity cannot be reconciled, the rule is firmly established that the federal courts have no jurisdiction to entertain proceedings seeking specific performance of the sovereign's contract, especially when the passage of title is not alleged. *Belknap* v. *Schild,* 161 U. S. 10, 18; *Tindal* v. *Wesley,* 167 U. S. 204, 219; *Ex parte Young,* 209 U. S. 123, 151–152; *Hopkins* v. *Clemson College,* 221 U. S. 636, 642; *Goldberg* v. *Daniels,* 231 U. S. 218; *Wells* v. *Roper,* 246 U. S. 335; *Ex parte New York,* 256 U. S. 490, 500; *Goltra* v. *Weeks,* 271 U. S. 536, 546; *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371. By the Tucker Act and the Federal Tort Claims Act, the United States has provided a forum which can award money damages against the Government for breach of contract and for certain types of tort, but, as these cases hold, the United States has not yet permitted itself to be sued for specific performance.

The long history of suits against the United States and its agencies and officers shows with abundant clarity that merely to assail the officer's authority will not alter the rule that a suit in which the relief sought or granted will finally determine or interfere with the Government's title, possession, or use of property, is a suit against the United States. *Belknap* v. *Schild,*

161 U. S. 10; *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601; *Goldberg* v. *Daniels,* 231 U. S. 218;* *Lankford* v. *Platte Iron Works,* 235 U. S. 461, 476; *New Mexico* v. *Lane,* 243 U. S. 52, 58; *Morrison* v. *Work,* 266 U. S. 481, 485–488; *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371; *Krug* v. *Fox,* 161 F. 2d 1013 (C. A. 4).

Petitioner points particularly to two recent cases, *Land* v. *Dollar,* 330 U. S. 731, and *Domestic and Foreign Commerce Corporation* v. *Littlejohn,* 165 F. 2d 235 (App. D. C.), now awaiting decision in this Court *sub nom. Larson* v. *Domestic and Foreign Commerce Corporation,* No. 31, wherein it was held that action could be maintained against an agent of the Government. For several reasons, the line of authorities leading up to the *Land* decision does not apply. First, the *Land* opinion expressly distinguishes an "attempt to get specific performance of a contract to deliver property of the United States" (*Id.* p. 737). Secondly, the *Land* theory requires the complainant to state a private common-law tort against the defendant, but petitioner neither as-

* In *Goldberg* v. *Daniels,* which the court below found to be here controlling in this aspect of the case (see note 6 *supra*), Mr. Justice Holmes said:

"We see no sufficient reason for thowing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the owner in posession of the vessel. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail" (231 U. S. at p. 221).

serts such a claim in its complaint, nor could it do so. Thirdly, another fundamental factor in the *Land* authorities is the complainant's claim that the property never belonged to the United States, coupled with an acknowledged substantial interest in the property, and possession of it, before the United States asserted any claim. Here petitioner does not go so far as to assert any property interest at all. Lastly, the judgments in the *Land* line of cases would not affect the rights of the absent United States, while petitioner's prayer that "Defendant negotiate with plaintiff" would, if granted, necessarily alter the status of the Government's ownership of the property. And, as to the *Domestic and Foreign Commerce Corporation* case, it is significant that the Court below, consisting of the same three judges who sat in the *Land* and *Domestic and Foreign Commerce Corporation* cases, in an opinion written by the author of the opinions in those two cases, held that neither were in point in the instant case (R. 75–76).

In conclusion, it should be noted that petitioner, in demanding that the court order "Defendant [to] negotiate with plaintiff," is asking that the extraordinary power of equity be exercised to control executive discretion. That the disposal of surplus property by the Administrator is a discretionary and not a ministerial act needs no elaboration. Since only a plainly ministerial act can be controlled by a mandatory injunction, settled judicial practice precludes judicial intervention

here. *Decatur* v. *Paulding,* 14 Pet. 497, 516; *Goldberg* v. *Daniels,* 231 U. S. 218; *Adams* v. *Nagle,* 303 U. S. 532, 542; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 127–128.

CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should, therefore, be denied.

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JANUARY 1949.

APPENDIX

The pertinent provisions of the Surplus Property Act of October 3, 1944, 58 Stat. 765, as amended by Section 2 of the Act of September 18, 1945, 59 Stat. 533, 50 U. S. C. App. 1611–1646 are:

> Sec. 2. The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—
>
> (a) to assure the most effective use of such property for war purposes and the common defense;
>
> (b) to give maximum aid in the reestablishment of a peacetime economy of free independent private enterprise, the development of the maximum of independent operators in trade, industry, and agriculture, and to stimulate full employment;
>
> (c) to facilitate the transition of enterprises from wartime to peacetime production and of individuals from wartime to peacetime employment;
>
> (d) to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise;
>
> (e) to foster and to render more secure family-type farming as the traditional and desirable pattern of American agriculture;
>
> (f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises;

(g) to encourage and foster post-war employment opportunities;

(h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;

(i) to establish and develop foreign markets and promote mutually advantageous economic relations between the United States and other countries by the orderly disposition of surplus property in other countries;

(j) to avoid dislocations of the domestic economy and of international economic relations;

(k) to foster the wide distribution of surplus commodities to consumers at fair prices;

(l) to effect broad and equitable distribution of surplus property;

(m) to achieve the prompt and full utilization of surplus property at fair prices to the consumer through disposal at home and abroad with due regard for the protection of free markets and competitive prices from dislocation resulting from uncontrolled dumping;

(n) to utilize normal channels of trade and commerce to the extent consistent with efficient and economic distribution and the promotion of the general objectives of this Act (without discriminating against the establishment of new enterprises);

(o) to promote production, employment of labor, and utilization of the productive capacity and the natural and agricultural resources of the country;

(p) to foster the development of new independent enterprise;

(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property;

(r) to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers;

(s) to dispose of surplus Government-owned transportation facilities and equipment in such manner as to promote an adequate and economical national transportation system; and

(t) except as otherwise provided, to obtain for the Government, as nearly as possible, the fair value of surplus property upon its disposition.

Sec. 3. As used in this Act—

(a) The term "Government agency" means any executive department, board, bureau, commission, or other agency in the executive branch of the Federal Government, or any corporation wholly owned (either directly or through one or more corporations) by the United States.

* * * * *

Sec. 8. The head of any Government agency, except the Surplus Property Administrator, may delegate, and authorize successive redelegations of, any authority conferred upon him or his agency by or pursuant to this Act to any officer, agent, or employee of such agency or, with the approval of the Surplus Propetry Administrator, to any other Government agency.

Sec. 20. Whenever any disposal agency shall begin negotiations for the disposition to

private interests of a plant or plants or other property, which cost the Government $1,000,000 or more, or of patents, processes, techniques or inventions, irrespective of cost, the disposal agency shall promptly notify the Attorney General of the proposed disposition and the probable terms or conditions thereof. Within a reasonable time, in no event to exceed ninety days after receiving such notification, the Attorney General shall advise the Surplus Administrator and the disposal agency whether, in his opinion, the proposed disposition will violate the antitrust laws. Upon the request of the Attorney General, the Surplus Property Administrator or other Government agency shall furnish or cause to be furnished such information as it may possess which the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section or to determine whether any other disposition of surplus property violates the antitrust laws. Nothing in this Act shall impair, amend, or modify the antitrust laws or limit and prevent their application to persons who buy or otherwise acquire property under the provisions of this Act. As used in this section, the term "antitrust laws" includes the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act; and the Act of August 27, 1894 (ch. 349, secs. 73, 74, 28 Stat. 570), as amended.

Pertinent Provisions of War Assets Administration Regulation 5 (12 F. R. 7423 and 7669):

§ 8305.1. *Definitions.*—(a) *Terms defined in the act.*—Terms not defined in paragraph (b) of this section which are defined in the Surplus Property Act of 1944 shall in this part have the meaning given to them in the act.

* * * * *

(6) "Fair value" means the maximum price which a well-informed buyer, acting voluntarily and intelligently, would be warranted in paying if he were acquiring the property for long-time investment or for continued use with the intention of devoting such property to the best or most productive type of use to which the property is suitable or capable of being adapted.

* * * * *

(11) "Industrial real property" means real property the highest and best use of which is for purposes of manufacturing, fabricating, or processing of products, for mining operations or for the construction, repair, or operation of ships and other water-borne carriers, and railroad trackage, pipelines, and pipe-line facilities used for transporting petroleum, petroleum products or gas, and power transmission lines. It includes land, or any interest in land, together with buildings, fixtures, facilities, utilities, and equipment located on such property or adapted to use in connection with such purposes, as well as unimproved land essential to the use of the property, and port terminals. It does not include, however, land, buildings, fixtures, facilities, utilities, or equipment classified by the Administration as airport property or nonindustrial property. In any case, the Administration may determine whether property is or is not industrial real property as defined herein.

* * * * *

(16) "Plant" means an industrial installation capable of operation as an economic unit and includes structures, buildings, fixtures, facilities, utilities and equipment of all types located on or used in the operation of the installation. It may or may not include the land.

* * * * *

§ 8305.3. *Basic policy.*—(a) In all actions taken pursuant to this part the disposal agency shall give due weight to the applicable objectives set forth in section 2 of the act. The Administrator finds that it is imperative that prompt action be taken with respect to the disposal of Government-owned real property except such property as may be needed for purposes of national defense. The disposal agency may, upon receipt of notice from the owning agency that property is to be declared surplus, take appropriate steps hereunder leading toward the disposal of real property prior to its declaration as surplus: *Provided, however,* That no final action shall be taken until an acceptable declaration has been filed.

(b) It is the policy of the Administrator that real property shall be disposed of by such methods as best meet the objectives of the act, including in appropriate cases the use of sealed bids.

(c) The disposal agency shall accept that proposal which it finds, upon an evaluation of all the information available to it, will most clearly tend to meet the applicable objectives and provisions of the act. In any case, the disposal agency shall reject any proposal if it finds that on the whole it conflicts with such objectives. In considering proposals the disposal agency shall give thorough consideration to whether such

objectives can best be met by leasing. Emphasis shall be placed upon the urgency of getting industrial property into civilian production or operation speedily so as to provide maximum employment in the postwar period. Due regard shall be given, however, to the possibility of enlarging the present major contribution to this objective which is made by small business and to the importance in this connection of maintenance of free independent competitive enterprise and the establishment of a maximum of independent operators in industry.

* * * * *

§ 8305.5. *Classification.*—All surplus real property shall be classified by the Administration to determine the methods and conditions of, and the priorities applicable to, the disposition of the property. The classification may be revised from time to time.

* * * * *

§ 8305.13. *Valuation and appraisal*—(a) *General.* Except as otherwise authorized by the Administration or as otherwise provided in this section, the disposal agency shall in all cases establish the fair value of the property assigned to it for disposition: *Provided, however,* That in those cases in which the property is classified as airport property and is to be disposed of to a State, local government or tax-supported institution, or is property which it is contemplated will be transferred to a Federal agency without reimbursement or transfer of funds, no estimate need be made of the value of the property.

* * * * *

§ 8305.15. *Submission of proposals by nonpriority offerors.*—All proposals made by any nonpriority holder interested in the

acquisition of surplus real property available for disposal in accordance with the provisions of this part shall be in writing and, in addition to the financial terms upon which the proposal is predicated, shall set forth the willingness of the offeror to abide by the terms, conditions, reservations, and restrictions upon which the property is offered, and shall contain such other information as the disposal agency may request. Any information submitted, the disclosure of which might tend to subject the offeror to a competitive business disadvantage shall, upon request, be held in strict confidence by the disposal agency and by any other Government agency to which it is made available.

* * * * *

§ 8305.18. *Price to priority claimants*—(a) *General.*—Except as hereinafter provided, the price to be charged priority purchasers shall be the fair value of the property offered for disposal.

* * * * *

§ 8305.19. *Acceptance of offers*—(a) *General.*—The disposal agency shall allow a reasonable period of time within which the successful bidder shall consummate the transaction and shall notify the successful bidder of the period allowed. Offers from priority holders at their respective established considerations shall be accepted in the order of their priority. If there are several acceptable offers at the same price or consideration from offerors in the same priority group or from nonpriority offerors, the offer to be accepted from that group shall be selected as provided in paragraph (c) of this section. In evaluating offers, the disposal agency shall be guided by all of the applicable objectives of the act. In

addition, due consideration shall be given to the offers of nonprofit institutions and such offers shall be carefully considered, bearing in mind the nature of the nonprofit institution and the use to which it proposes to put the property. Disposal agencies may reject any offer which is below the fair value of the property other than an offer from a priority holder for the maximum consideration established for a transfer to such a priority holder. When a veteran, the spouse and children of a deceased serviceman, or an owner-operator has made an offer for more than one unit, only one of the offers of such offeror shall be accepted. No disposal shall be made at a price which is more than twenty-five (25) per centum below the established fair value until such disposal has been reviewed and approved by the Administration, unless that price or consideration is the maximum price or consideration which may be charged the purchaser.

* * * * *

(c) *Equal offers.*—If equal acceptable offers are received for the same property from two or more offerors of the same priority group, or if equal offers are received from two or more nonpriority offerors, selection shall be made as follows:

* * * * *

(2) * * * With respect to all other priority groups and nonpriority offerors, the selection shall be determined, unless otherwise directed by the Administration, by taking into consideration actual proposals received and the use of the property most desirable in the light of the applicable objectives of the act.

* * * * *

(d) *Notice to unsuccessful bidders; nonperformance by successful bidder.*—When an offer for surplus real property has been accepted, the disposal agency shall notify the unsuccessful bidders of such acceptance and return their deposits, if any, to them. If the successful bidder fails to complete the transaction, the disposal agency shall promptly notify by mail all those who made unsuccessful offers during the priority period or any time allowed thereafter that if they renew their offers within fifteen (15) days from the date of mailing of the notice they will be reconsidered on the same basis on which they would have been considered had the offer accepted not been received in the first instance.

(e) *Absence of acceptable offers; methods of sale.*—If no acceptable offer is received, the disposal agency shall proceed to dispose of the property by negotiated sale, auction, or other suitable method. Such disposals shall be subject to the price restrictions of paragraph (a) of this section, unless otherwise authorized by the Administration.

* * * * *

§ 8305.25. *Submission to Attorney General and approval by regulatory agencies.*—(a) *Attorney General.*—In any case in which real property available for disposal hereunder cost $1,000,000 or more, a complete statement of any proposed disposal to private interests which has been tentatively decided upon, including all information compiled or obtained by the disposal agency, shall be made available by the disposal agency to the Attorney General as required by section 20 of the act.

* * * * *

§ 8305.28. *Exceptions.*—Exceptions to any portions of the procedure set forth in this part may be made by direction of the Administrator where such exception would not be in violation of the act.

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